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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY EARL JOHNSON,

Defendant and Appellant.

B209079

(Los Angeles County
Super. Ct. No. NA077445)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Gary J. Ferrari, Judge. Affirmed.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and
Johnson.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and
Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Larry Johnson of corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a)),¹ and the trial court found that Johnson had suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served three prior prison terms (§ 667.5, subd. (b)). Johnson contends the prosecutor committed prejudicial misconduct in his opening statement and that the trial court erred in admitting evidence of prior incidents of domestic violence. We disagree and affirm the judgment.

FACTS

On December 9, 2007, Long Beach Police Officers Robert Guerrero and Chamnan Sok found Wanda Scott laying on the sidewalk near a residence on West Pleasant Street. She had a small laceration to her ear, patches of missing hair, and bruises on her head; she did not appear to be intoxicated. When the officers asked Scott what had happened to her, Scott said she had been awakened from her sleep the day before by Johnson's yelling. Scott said Johnson had straddled her and began punching her, and she immediately felt a sharp pain in the left ear area possibly caused by a sharp object that Johnson may have had in his hand. Scott said Johnson had then grabbed her by the hair, tearing out clumps of her hair, and pulled her to the ground. Scott said she had screamed and broken free from Johnson, and that Johnson had fled at that point.

In addition to her description of the attack, Scott also told the officers that Johnson had hit her "countless" times during their years-long relationship, and had also abused her by punching, kicking, and knocking her unconscious. Scott told the officers she wanted Johnson to be prosecuted.

In May 2008, the People filed a second amended information charging Johnson with one count of corporal injury on a cohabitant. The information further alleged that Johnson had served three prior prison terms, and that he had a prior strike conviction in 1972 for robbery (in Louisiana). The charge was tried to a jury in May and June 2008, with Scott as the prosecution's first witness. When called to testify, Scott denied making

¹ All further references are to the Penal Code unless otherwise specified.

any statements to the police, and denied that Johnson had ever hit her.²

According to Scott, she had been drinking all morning on December 8, 2007, and had become intoxicated, and fell asleep in the afternoon on a street near some sharp metal pipes. When she woke up, she was still intoxicated, felt a trickle on her face, discovered her cut, and went to the home of a friend named “Frank” to call the police. Scott told the officers she was drunk. Scott had not seen Johnson during the three days leading up to the incident. Following Scott’s testimony, Officers Guerrero and Sok testified to the matters they had seen and heard when they found Scott, and evidence of several prior incidents of domestic violence by Johnson was introduced to show that Scott had previously recanted reports of violence. In his defense, Johnson called Scott as his only witness, and she again testified that she had been drunk when she spoke to the officers who found her on December 9, 2007.

The jury found Johnson guilty as charged and after he waived jury on his priors, the trial court found true that he had both a prior strike conviction, and had served three prior prison terms. He was thereafter sentenced a total term of 11 years in state prison, comprised of the middle term of four years, doubled to eight years for the prior strike, plus three one-year terms for the prior prison terms.

DISCUSSION

I. Prosecutorial Misconduct.

Johnson contends his conviction must be reversed for prosecutorial misconduct during opening statement. Johnson contends the prosecutor made a series of comments which were “so prejudicial as to deprive [him] of his right to confrontation. . . .” According to Johnson, the prosecutor touted evidence, never produced, which was “in a form not subject to cross-examination.” We find no ground in the prosecutor’s opening statement justifying a reversal of Johnson’s conviction.

² Scott had made similar denials at Johnson’s preliminary hearing.

A. The Prosecutor's Comments.

During a pretrial hearing, the trial court addressed the issue of the admissibility of Johnson's prior instances of domestic violence, and ruled that evidence of five incidents would be allowed into evidence. Shortly thereafter, the prosecutor gave his opening statement, which included comments addressing Johnson's history of domestic violence. On appeal, Johnson contends the following comments within the prosecutor's opening statement amounted to misconduct:

- “As his honor said, opening statement is just a general idea of what the evidence purports to say. Within it, I need you to be aware that the facts in this case are about whether the defendant is a dangerous and violent person. A six-four, 200-pound person that couldn't stop hitting this woman that he has a child --- ”

At this point, Johnson's counsel objected without stating grounds, and the trial court overruled the objection.

- “This is about Mr. Johnson. Jealous. You'll hear evidence in regards to repeated hitting, in regards to stabbing, in regards to jealous rage, in regards to kicking on the ground. It will be a lot of evidence. However, this is a classic domestic violence case because in this case, as in many, the victim now gets on the preliminary hearing --- ”

At this point, defense counsel objected that the prosecutor was engaging in “argument.” The trial court again overruled the objection.

- “[W]e need the jury to listen to the evidence, because when [Scott] testifies at the prelim, as I kind of indicated to you, she has said, ‘I’ve only talked to the police once on this case. He’s only hit me once or twice at the most,’ and that her statement is inconsistent totally with what she told the officers [at the scene]. [¶] Which then brings up, all we’re doing is we’re starting with the year 2000. When the defendant is around her, you will find it’s just continued reporting. [¶] She, on the original report in 2000, she explained she just gets tired of being hit, she’s just tired of it. These prior

incidents are not before you to determine whether or not — he’s only being prosecuted at this time for one. . . . [¶] . . . [¶] It will go — it will be several events, but the events include a constant theme of jealousy, of calling the “B” word, of pulling hair, of waking her up with violence on one occasion. [¶] There [will be] six or seven --- or five, I believe before you. All just between . . . 2000 and 2001. And then in 2007, when he’s back around her, there is another incident or two there.”

At this point, defense counsel requested to approach the bench, and the trial court responded, “No, the objection is overruled.”

- “The evidence will show that [Scott] is what’s called [led] at the preliminary hearing. ‘Okay. You were drinking that night, right?’ And, ‘Oh, you drank to a blackout, right?’ Actually, [the] defense posed questions where [Scott] was going, ‘Yeah, I was blacked out. Yeah, I was drinking.’ These are not testimony from her; they are answers to a leading question from the defense. That’s significant because --- ”

At this point, defense counsel objected to the prosecutor’s “argument.”

This time, the trial court agreed that the prosecutor’s comments were “becoming an argument,” and admonished the prosecutor, “Just please indicate what the evidence is going to show.”

- “The evidence will show that [Scott] has suggested things like pipes in the alley. She’s suggested that she’s drinking. . . . [¶] . . . [¶] So, I . . . have to go through the reports with [Scott] for her to deny these things, and then I need to call the officers to impeach [her with] what they are going to say she told them. So, it takes a while. I’m going to line up witnesses and go as fast as I can.” At this point, defense counsel objected to the prosecutor “talking about when something is impeachment. This is supposed to be opening statement.”

And, again, the trial court overruled the objection.

B. The Allegations of Error Were Not Forfeited.

Before we may address Johnson's claim of prosecutorial misconduct, we must first address the People's contention that his claim is forfeited on appeal. As a general rule, a defendant's claim of prosecutorial misconduct is deemed forfeited on appeal unless the defendant made a timely objection to the asserted misconduct at trial and requested that the jury be admonished to disregard the impropriety. (*People v. Prince* (2007) 40 Cal.4th 1179, 1294.) The People argue that, while Johnson's trial counsel interposed an objection that the prosecutor's opening statement improperly included "argument," he never specifically objected that those comments amounted to "prosecutorial misconduct." The People's argument does not persuade us to foreclose Johnson's claim of prosecutorial misconduct on appeal because their legal authorities do not support the proposition that utterance of the words "prosecutorial misconduct" in the trial court is an absolute prerequisite to preserve a claim of prosecutorial misconduct on appeal. We accept that an objection at trial on the ground the prosecutor was making "improper argument" is sufficient to preserve a claim on appeal that the prosecutor was engaging in "misconduct." Although the People are correct that Johnson's defense counsel did not request any admonishments in connection with his objection, we are satisfied that such a request would have been futile because the trial court had already overruled the objections before any request for an admonishment could have been made. (*People v. Hill* (1998) 17 Cal.4th 800, 821.)

C. The Relevant Law.

Prosecutorial misconduct involves the use of deceptive or reprehensible methods to persuade either the court or the jury. (*People v. Valdez* (2004) 32 Cal.4th 73, 122.) In examining whether such methods were employed, the defendant need not show bad faith on the part of the prosecutor; injury to the defendant is nonetheless an injury regardless of whether it was committed inadvertently rather than intentionally. (*People v. Hill, supra*, 17 Cal.4th at p. 823.) At the same time, however, a reviewing court should not " "lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' " (*People v. Wilson* (2005)

36 Cal.4th 309, 337-338.) Only where prosecutorial misconduct so infected a trial with unfairness as to make the defendant's resulting conviction a denial of due process, will it constitute an error of constitutional magnitude. (*People v. Prieto* (2003) 30 Cal.4th 226, 260.) Prosecutorial misconduct which merely exposes jurors to improper factual matters is tested under the harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Garcia* (1984) 160 Cal.App.3d 82, 93-94, fn. 12.)

D. The Prosecutor's Arguments Were Not Misleading.

Assuming without deciding that the prosecutor's comments during his opening statement traipsed into the area of argument, the comments did not amount to a deceptive or reprehensible method of persuasion. (*People v. Rowland* (1992) 4 Cal.4th 238, 277.) We see nothing in the record which tends to suggest to us that Johnson's case was tipped against him by the prosecutor's opening statement. At most, the prosecutor may have laid argument on top of his explanation of the evidence of prior incidents which was to be introduced at trial, but that evidence had already been ruled admissible, and was going to be, and was, introduced at trial, and it was the nature of the evidence in this case, not the prosecutor's opening statement, which mattered.

We also note that, immediately prior to the prosecutor's opening statement, the trial court instructed the jury that opening statements were not evidence, but simply an outline of what counsel believed or expected the evidence would show. The trial court also instructed the jury after the evidence had been presented that statements by attorneys were not evidence. We presume the jury obeyed the trial court's instructions. (See, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 1002 [prosecutor's inaccurate assertions in opening statement found harmless where trial court instructed the jury that opening statement was not evidence].) We simply are unable to accept that the prosecutor's opening statement rendered Johnson's trial fundamental unfair, or that it any way affected the outcome of his trial.

II. Prior Incidents of Domestic Violence.

Johnson contends his conviction must be reversed because the trial court erred when it ruled that evidence of his prior incidents of domestic violence were admissible. We disagree.

A. The Prior Incidents.

The prosecution introduced the evidence of prior incidents of domestic violence by Johnson against Scott largely for the purpose of impeaching Scott's denials that he had hit her during the current and prior incidents. In each of these cases, Scott would claim that she and Johnson were simply arguing, that Johnson never hit her, or that she could not remember talking to the police.

Long Beach Police Officer Matthew Dougherty testified regarding the first prior incident. According to Officer Dougherty, he went to the apartment in which Scott and Johnson lived on February 14, 2000, in response to an "incomplete" 911 call. When the officer arrived, the front door was open, and he could hear a male and female speaking loudly. Johnson walked outside and was detained. Scott told the officer that Johnson had grabbed her right arm, twisted it, and told her to shut up. Scott was adamant that Johnson be arrested, said she was tired of him beating her up, and signed a citizen's arrest report. Officer Dougherty testified he had been dispatched to the Johnson/Scott residence "at least a dozen times" in recent years.

Long Beach Police Officer Gary Hodgson testified regarding the second prior incident. According to Officer Hodgson, he went to Scott's residence on April 30, 2000, in response to a call by Scott's sister after she saw Scott's injuries. Scott told the officer that she was asleep in her bed, next to her child, when Johnson punched her in the face and accused her of cheating on him. Johnson punched her in the face a second time and then left. Officer Hodgson observed that Scott had a bloody lip, but Scott did not want to file charges. According to Officer Hodgson, he had "countless" contacts with Johnson since 2000.

Long Beach Police Officer Kevin King testified regarding the third prior incident. According to Officer King, he responded to a domestic violence call that was later “cancelled.” When Officer King arrived, Scott had some swelling on her face. Scott said that Johnson had threatened her, and hit her with an open hand with full force on the right side of her face, causing her to feel light-headed and dizzy. Scott called the police but then tried to cancel the call when Johnson begged her not to call. The officer said that Scott wanted Johnson arrested, telling him that Johnson had hit her three weeks prior, causing two black eyes and a bloody lip. She said that Johnson was a violent person and that she was tired of the abuse.

Officer Dougherty testified regarding the fourth prior incident. According to Officer Dougherty, he responded to an assault with a deadly weapon call. Scott told the officer that Johnson had come to her apartment, yelling at her and accusing her of cheating on him. Johnson eventually punched her in the face and stabbed her with a screwdriver in the arm as she ran away. She showed the puncture wound to the police and told the officer that Johnson had threatened to kill her in the past.

Cecilia Williams testified regarding the fifth prior incident. According to Williams, she saw Scott on October 19, 2007, standing outside a liquor store, screaming. Johnson ran towards Scott, screaming at her, and punched her twice in the face. Scott fell to the ground crying and folding up as if her stomach hurt her. Johnson continued to yell at her until he got into a car, and left the scene.

B. The Relevant Law.

Evidence Code section 1109 provides that evidence of the defendant’s prior acts of domestic violence is admissible in a criminal action in which the defendant is accused of an offense involving domestic violence, subject to the condition, however, that the evidence of prior domestic violence is admissible under Evidence Code section 352. Under Evidence Code section 352, a trial court has discretion to exclude evidence when its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. The prejudice contemplated

under Evidence Code section 352 is not synonymous with “damaging,” but applies to evidence which “ ‘uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.’ ” (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138; see also *People v. Waidla* (2000) 22 Cal.4th 690, 724 [evidence is more prejudicial than probative when it poses an “intolerable risk to the proceedings’ fairness or the outcome’s reliability”].)

Evidence Code section 1109 reflects a legislative determination that prior acts of domestic violence have inherent probative value in a domestic violence prosecution. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333-1334.) In determining whether the probative value of evidence outweighs the prejudice, the court uses a balancing test and may consider such factors as “whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s).” (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

A trial court’s decision concerning admissibility of evidence under Evidence Code sections 1109 and 352 is reviewed on appeal under the abuse of discretion standard, and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Brown, supra*, 77 Cal.App.4th at p. 1337.)

We disagree with Johnson’s argument that our review should be de novo in light of our Supreme Court’s opinion in *People v. Cromer* (2001) 24 Cal.4th 889 (*Cromer*). In *Cromer*, our Supreme Court explained that, when a trial court decides a matter involving “mixed questions of law and fact,” and which implicates a defendant’s constitutional rights, a reviewing court only defers to the trial court’s findings on “historical facts,” and, once the facts are settled, must independently review the constitutional questions under those facts. (*Id.* at pp. 893-902.) In *Cromer*, the issue was the Confrontation Clause, and whether the prosecution had shown “due diligence” in the search for the witness, so that the witness’s prior testimony could be introduced in her

absence. The “balancing” of factors determination required under Evidence Code sections 1109 and 352 is not, in our view, akin to the mandatory predicate factual finding of “due diligence” in the Confrontation Clause context.

C. The Prior Acts Evidence Was Properly Admitted.

We do not see an abuse of judicial discretion in the trial court’s decision to allow the introduction of the incidents of prior domestic violence. The evidence of Johnson’s prior acts of domestic violence was extremely probative given Scott’s testimony denying she told police much of anything, and her testimony that the injuries she suffered when found by police in the current incident resulted from an accident. The prior incidents of domestic violence against Scott tended to show Johnson’s pattern of abuse against Scott, negating the “accident” scenario.

Juxtaposed against its probative value, the nature of the evidence of Johnson’s prior acts of domestic violence was not significantly more inflammatory than the charged offense. In the present offense, police found Scott on the street with a laceration to the back of her head, and redness and bruising to her face. A photograph of her injuries was presented to the jury. Evidence of injuries suffered by Scott from Johnson’s previous instances of violence were of a similar nature, and included a small “puncture wound,” “swelling” on her face, and a “bloody lip.” These injuries were observed by police officers. The evidence of prior incidents of domestic violence was no more inflammatory than the evidence of the attack in the current incident. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

The trial court instructed the jury on the purpose of the prior incidents of domestic violence. The court instructed the jurors that they could, but were not required to, infer from the prior domestic violence instances that Johnson had a disposition to commit other offenses involving domestic violence, and that, if Johnson had such a disposition, they could, but were not required to, infer that he was more likely to commit the currently charged offense. At the same time, however, the court further instructed the jury that, if they found Johnson had committed prior acts, that fact was not enough to prove beyond a reasonable doubt, that he had committed the currently charged offense.

We also reject Johnson’s argument that the evidence of his prior domestic violence should have been excluded because it consumed an undue amount of trial time. While testimony of the prior incidents was a significant part of trial, it was highly probative, and, for the similar reasons to those expressed above in addressing Johnson’s prejudicial arguments, we find no abuse of discretion in the trial court’s determination that the time spent on the prior incident evidence did not outweigh its probative value. (*People v. Callahan* (1999) 74 Cal.App.4th, 370-371.)

Johnson’s attacks on Officer Dougherty’s testimony that he had contact with Johnson and Scott “at least a dozen times,” and Officer Hodgson’s testimony that he had “countless” contacts with Johnson since 2000, fail because, first, we see no trial objection to those passages of testimony, and second, the passages were not, in any event, prejudicial when viewed in light of the remaining properly admitted evidence of prior incidents of domestic violence. No details were elicited about these other “contacts,” and, to the extent Johnson contends the evidence painted him as “the prototypic violent, controlling husband,” it did not arise from the passing references to his generalized contacts with police, but from the specific instances of prior violence.

DISPOSITION

The judgment is affirmed.

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BIGELOW, J.

We concur:

FLIER, Acting P. J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.